Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1094

AUTHORIZED AIR CONDITIONING CO., INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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No. .....

AUTHORIZED AIR CONDITIONING CO., INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, Authorized Air Conditioning Co., Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 19, 1979.

Opinion Below.

The opinion of the Court of Appeals, *Authorized Air Conditioning Co., Inc. v. NLRB,* 606 F.2d 899 (1979), appears as Appendix A. The Decision and Order of the National Labor Relations Board ("Board"), 236 N.L.R.B. No. 24 (1978), which was reviewed by the Court of Appeals pursuant to a Petition for Review, 29 U.S.C. § 160(f), appears as Appendix B.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on October 19, 1979. No petition for rehearing was filed.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). *See* 29 U.S.C. § 160(e) and (f).

Questions Presented.

1. Whether a construction industry employer's individual "pre-hire" collective-bargaining agreement with a minority union, which was lawful under Section 8(f) of the National Labor Relations Act, 29 U.S.C. § 158(f), endows the union with a presumption of majority status sufficient to permit the Board to merge that employer into a multi-employer bargaining unit and bind it to the results of future multi-employer collective bargaining.

2. Whether a "pre-hire" collective-bargaining agreement with a minority union is enforceable under the National Labor Relations Act on other than a project-by-project basis.

Statutory Provisions Involved.

United States Code, Title 29:

§ *157.*

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such

right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

§ *158(a)(1) and (5).*

"It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [§ 157];

". . .

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [§ 159(a)]."

§ *159(a).*

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ."

§ *158(f).*

"It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this

Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement . . . . *Provided further,* That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)."

Statement of the Case.

Petitioner is a heating, cooling, and air-conditioning contractor in the building and construction industry, operating primarily in the Southern California area. At the relevant times herein, Paul Osborne was Petitioner's president and general manager.

In July, 1974, Osborne approached Paul Healy, the business manager of Sheet Metal Workers' International Association, Local Union No. 509 ("Local 509"), to discuss the possibility of employing Local 509 members. On September 9, 1974, Osborne signed a collective-bargaining agreement with Local 509 that consisted of two documents: a Standard Form of Union Agreement ("Standard Form"), which was a contract negotiated by the Sheet Metal Workers' International Association ("International") and the Sheet Metal and Air Conditioning Contractors' National Association ("SMACCNA"), and an Addendum to the Standard Form ("Addendum"), which was negotiated by Local 509 and the Inland Air Conditioning and Refrigeration Contractors' Association ("Association"). Both documents were to be effective until July 31, 1976.

When Osborne signed the collective-bargaining agreement, none of Petitioner's employees were members of Local 509 or had otherwise authorized Local 509 to represent them. The collective-bargaining agreements were "pre-hire" agreements, valid under Section 8(f) of the National Labor Relations Act ("Act"), 29 U.S.C. § 158(f), even though executed before the majority status of Local 509 had been established.

Article V, Section 1, of the Standard Form contained a "union-security" provision under which the employer agreed to require its employees to become members of the union within eight days of an employee's first day of work as a condition of continued employment.

On September 29, 1975, while the collective-bargaining agreement was, by its terms, still in effect, Petitioner submitted applications for membership in the Association and its parent organization. On December 18, 1975, Petitioner was accepted as a member thereof. When Petitioner's applications were accepted, a majority of the Petitioner's employees were *not* members of Local 509, and the eight-day union-security provision in the Standard Form was not being enforced.

On February 26, 1976, Local 509 gave the Association timely notice of its intent to reopen its agreement with the Association, and negotiations commenced on May 20. In late June, the Association provided Local 509 with a list of its members. Petitioner's name was included on that list. By August 4, the only unresolved issue between Local 509 and the Association in the negotiations was wages. On August 9, 1976, those two parties, being unable to reach a consensus, submitted the wage issue to a third party, the National Joint Adjustment Board ("NJAB"), as provided in

the respective Association-Local 509 agreements. On August 11, the NJAB issued a unanimous decision setting forth the wage increase to be included in the new contract and providing that the contract would be effective from August 1, 1976, through July 31, 1978. The Association and Local 509 entered into the new collective-bargaining agreement, and Local 509 began to contact the individual members of the Association in order to secure their signatures on the new contract.

In late August, Local 509 contacted Osborne and asked that Petitioner sign this new collective-bargaining agreement negotiated by the Association and Local 509. Petitioner refused.

The Board, in agreement with its Administrative Law Judge, found that Petitioner had violated Sections 8(a)(1) and (5) of the Act, 29 U.S.C. §§ 158(a)(1) and (5), by refusing to sign the new collective-bargaining agreements and to abide by their terms. The Board ordered, *inter alia,* that Petitioner recognize and bargain with Local 509 as the representative of its employees, and that it sign, implement, and give retroactive effect to the collective-bargaining agreement.

The Court of Appeals denied Petitioner's request that such Order be vacated, and enforced the Board's Order.

REASONS FOR GRANTING THE WRIT.

1. The Decision Below Conflicts With This Court's Decision in NLRB v. Iron Workers, Local 103 (Higdon Contracting), 434 U.S. 335 (1978).

The pivotal question before both the Board and the Court of Appeals was whether Petitioner could effectively merge its employees into a multi-employer collective-bargaining unit at a time when Local 509 was a *minority* union.

The Administrative Law Judge's decision in this case issued before this Court's decision in *NLRB v. Iron Workers, Local 103 (Higdon Contracting)*, 434 U.S. 335 (1978). The Board itself did not expressly consider *Higdon* when it affirmed the Administrative Law Judge, even though the Board issued its decision *after* the *Higdon* decision.

The Court of Appeals treated this Court's *Higdon* decision as determinative, but erroneously concluded that because Local 509 *once* represented three of five of Petitioner's employees, the Section 8(f) pre-hire agreement thereafter gave rise to a continuing *presumption* of majority status, so as to permit Petitioner to merge its employees into a multi-employer bargaining unit when Local 509 was actually a *minority* union.

The decision below obligates Petitioner to recognize and bargain with an admittedly *minority* union, which does not represent a majority of Petitioner's employees, simply because the Board and the Court of Appeals manufactured a presumption that utterly fails to mirror reality and which is at odds with this Court's decisions. This Court in *Higdon* stated emphatically

> (a) There is "no clearer abridgment of § 7 of the Act . . . than to grant exclusive bargain-

ing status to an agency selected by a minority of its employees, thereby impressing that agent upon the nonconsenting majority."; 434 U.S. at 344;

(b) "Section 8(f) is an exception to this rule," but is "of limited scope, for the usual rule protecting the union from inquiry into its majority status during the terms of a collective-bargaining contract does not apply to prehire agreements."; 434 U.S. at 345;

(c) Section 8(f) does not "expand the duty of an employer under § 8(a)(5) . . . to require the employer to bargain with a union with which he has executed a prehire agreement . . . ."; 434 U.S. at 346; and

(d) "The employer's duty to bargain and honor the contract is contingent on the union's attaining majority support at the various construction sites." 434 U.S. at 345.

This Court's view, thus, is that Section 8(f) prehire contracts do not endow the contracting union with the ability to enforce them before the Board, absent proof that the union is the *majority* representative at the employer's *various construction sites. See NLRB v. Irvin-McKelvy,* 475 F.2d 1265 (3d Cir. 1973), cited with apparent approval in this Court's *Higdon* opinion. *See* 434 U.S. at 345-46.

The Court of Appeals below did not comply with this site-by-site majority requirement. Indeed, the Board's General Counsel has not affirmatively established the union's majority status at *any* of Petitioner's jobsites.

Hence, the decision below conflicts with this Court's *Higdon* decision; it expands the duty to bargain under Section 8(a)(5) of the Act to embrace an employer's

relationship with a *minority* union. Petitioner had *no* Section 8(a)(5) duty to bargain with Local 509 in September, 1974, when Petitioner executed the pre-hire contract. There is no doubt that in December, 1975, when Petitioner's application for membership in the Association was accepted, a majority of Petitioner's employees *were not* members of Local 509. Simply put, Petitioner had *no* duty to bargain with Local 509 at that time.

The duty to bargain and honor the Section 8(f) pre-hire contract is contingent on the union attaining, and holding, majority status at the various construction sites. *NLRB v. Ironworkers, Local 103* (*Higdon Contracting*), *supra*; *see also, Dee Cee Floor Covering, Inc., et al.,* 232 N.L.R.B. 421 (1977). The duty is not, as the Court of Appeals concluded, dependent simply upon one-time majority status.

The conflict between this Court's decision in *Higdon* and the decision of the Court of Appeals below is clear and complete. Under *Higdon,* Petitioner may be held to a Section 8(a)(5) duty to honor the Association contract *only if* Local 509 had majority status among Petitioner's employees at Petitioner's various construction sites. As the Court of Appeals noted, Local 509 did not have actual majority status at the time Petitioner's Association membership application was accepted. Rather, Local 509 was a *minority* union, to which Petitioner owed no duty.

The Court of Appeals justified its decision by quoting and applying one sentence, out of context, of the *Higdon* opinion:

> "It is also undisputed that when the union successfully seeks majority support, the prehire agreement attains the status of a collective bargaining

agreement executed by the employer with a union representing a majority of the employees in the unit." 434 U.S. at 349-50.

This comment by this Court was in passing, and only as an answer to the position of the union in *Higdon* that Section 8(f) would be rendered meaningless if this Court adopted the Board's view of Section 8(f) *vis-a-vis* the Section 8(a)(5) duty to bargain. The Court of Appeals' reliance upon the comment conflicts with the *Higdon* Court's weightier statement that the duty to honor such a contract is *contingent* on the union's majority status at the various construction projects during the contract's term. (The two statements are not irreconcilable, however. If the duty to bargain and honor the contract is contingent upon the union's majority at each project, then it follows, naturally, that the pre-hire agreement's stature matures at such projects *when the union has majority status at such projects. See, e.g., NLRB v. Irvin-McKelvy, supra.*)

The Court of Appeals' reliance upon the above-quoted statement to determine Petitioner's duty to bargain in the circumstances of this case led to a misapplication of the *Higdon* decision and should be reviewed and reversed by this Court.

2. The Decision Below Conflicts With Decisions of Other United States Circuit Courts of Appeal.

On the issue of the status of the "pre-hire" relationship between Petitioner and Local 509, the Ninth Circuit's decision below conflicts with decisions of the Sixth and the Third Circuits. *See NLRB v. AAA Electric Inc.*, 472 F.2d 444 (6th Cir. 1973); *NLRB v. Irvin-McKelvy, supra.*

In *AAA Electric*, the Sixth Circuit refused to enforce an NLRB Section 8(a)(5) bargaining order where the employer had orally entered into a Section 8(f) pre-hire agreement with the union and the employer utilized only union members to work at a specific project. The employer repudiated the agreement by its conduct, terminated the union members, and hired a new non-union work force for the project.

The Court stated:

> "The valid economic termination of all of the employees resulted in the loss of majority status on the part of the Union. There is no duty to bargain with a union under these circumstances. Accordingly, we find that the Company's withdrawal of recognition from the Union did not constitute a violation of § 8(a)(5) of the Act." 472 F.2d at 449.

In *NLRB v. Irvin-McKelvy, supra*, the Third Circuit enforced the Board's Section 8(a)(5) bargaining order which was limited *only* to those *projects* at which the union had actual majority status.

The Court of Appeals below has, *sub silentio*, adopted a different rule—that the Section 8(f) pre-hire relationship ripens into a full Section 8(a)(5) relationship, with all that such a relationship imports, including "presumptions" of majority status at *any* point in time or on *any* construction project. Such a rule is at odds with that adopted, at least inferentially, by other courts.

The conflict so created calls for this Court to exercise its discretion and to resolve the question as to when

a construction industry employer has the duty to honor a Section 8(f) "pre-hire" contract under Section 8(a)(5) of the Act.

3. This Case Presents Novel and Heretofore Unanswered Questions Under the National Labor Relations Act Concerning the Proper Application of Section 8(a)(5) and Section 8(f) Principles in a Multi-Employer Collective-Bargaining Unit Context.

The proper application of Section 8(a)(5) rules concerning "presumptions" of majority status to benefit a minority union party to a Section 8(f) pre-hire contract has never been definitively treated by this Court. *See NLRB v. Iron Workers, Local 103* (*Higdon Contracting*), *supra* at n. 12.

The Board and the Court of Appeals applied a "presumption" of Local 509's majority status to validate the merging of Petitioner's employees into the multi-employer collective-bargaining unit. The Board has never, however, except in the instant case, held that any "presumption" can be so applied. *See, e.g., Alton-Wood River Building and Construction Trades Council* (*Kopp-Evans Const. Co.*), 144 N.L.R.B 260 (1963); *Davenport Insulation, Inc.*, 184 N.L.R.B. 980 (1970). The Court of Appeals noted this Court's recitation of the *possibility* of a presumption of majority by quoting this Court's footnote in the *Higdon* case:

> "One-time majority status, coupled with a union security clause that has been enforced, gives rise to a rebuttable presumption of continued majority status, in the Board's view. See R. J. Smith, 191 NLRB, at 695." 434 U.S. at 351 n. 12.

Neither the Board nor this Court in *Higdon* held that the union was entitled to an overall *presumption* of

majority because of one-time such status at one project. The Board in its decision in *Higdon* stated:

> "[T]he Board recognized the industrial realities of the construction industry in finding that 8(f) contracts do not carry, even with union-security provisions, a presumption of majority status until such time as employees for particular projects have been hired.[5]"

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[5]More precisely until the provisions of the union-security clause have taken effect at a project (usually 7 days)." 216 N.L.R.B. 45, 46 (1975).

The decision below relies upon a "presumption" of majority status in order to circumvent the general rule that an employer may not unilaterally and without express or implied employee consent bind its employees to representation in a multi-employer unit. *Dancker & Sellew, Inc.*, 140 N.L.R.B. 824, 825-26 (1963), *enforced sub nom., NLRB v. Int'l Bro. Teamsters, Local 210*, 330 F.2d 46 (2d Cir. 1964); *Mohawk Business Machines Corp.*, 116 N.L.R.B. 248, 249 (1956); *Pepsi-Cola Bottling Co.*, 55 N.L.R.B. 1183, 1186-86 (1944).

The use of the "presumption" negates the *Higdon* rationale, as well as the final proviso to Section 8(f) of the Act which permits challenges to the minority union's representative status even *during* the pre-hire agreement's term. The application of "presumptions" of majority to determine an employer's *duty* to bargain heretofore has been exclusively confined to non-construction industry and non-Section 8(f) cases. The use of such a "presumption" to bind Petitioner, a Section 8(f) construction industry employer, and its employees, to Local 509 fails to accord its employees their Section 7 (29 U.S.C. § 157) right to reject union

representation, fails to reflect the reality of Local 509's minority status, and only serves to entrench Local 509 as a minority union with majority rights.

This type of novel factual and legal anomaly, which has never been reviewed by this Court, calls out for the exercise of this Court's independent review.

Since whether Petitioner effectively "joined" the Association for collective-bargaining purposes is dependent upon the appropriate application of Sections 8(f) and 8(a)(5) of the Act, and "presumptions of majority" to this case, this Court should clarify the Act's parameters of the Section 8(f) employer-union relationship. Numerous cases recently have been decided by the Board involving these issues without the guidance of this Court, leading to decisions seemingly at odds with themselves and with the Court's *Higdon* decision. Compare, *Dee Cee Floor Covering, Inc.*, 232 N.L.R.B. 421 (1977), *e.g.*, *Precision Striping, Inc.*, 245 N.L.R.B. No. 34 (1979) and *G. M. Masonry* 245 N.L.R.B. No. 54 (1979). Indeed, the Board's General Counsel recently issued certain "Guidelines" for handling Section 8(f)-Section 8(a)(5) cases, which Guidelines purport to clarify the law without the benefit of this Court's guidance. *See NLRB Guidelines on Construction Pre-Hire Agreements*, 101 L.R.R. 27 and 101 L.R.R. 51 (1979). As former NLRB General Counsel John S. Irving remarked in issuing the "Guidelines":

> "Today, some 20 years after its passage, Section 8(f) of the Act continues to be source of novel legal issues, giving rise to some uncertainty among the Regional Offices, among labor law practitioners, and in the construction industry in general. Recent decisions by the Supreme Court and the Board have begun to clarify some areas

> but there are others where substantial doubt remains." 101 L.R.R. 27.

The issues in the instant matter afford this Court an opportunity to clarify the "doubt" concerning Section 8(f) and Section 8(a)(5) of the Act. This Court should now examine these issues in depth, and inform current and potential litigants in the construction industry, one of the nation's largest and most necessary, of their labor law obligations.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Los Angeles, California.

Dated: January 11, 1980.

Respectfully submitted,

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APPENDIX A.

Opinion.

United States Court of Appeals for the Ninth Circuit.

Authorized Air Conditioning Co., Inc., Petitioner, v. National Labor Relations Board, Respondent. No. 78-2427.

Filed Oct. 19, 1979.

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

Before: BARNES, BROWNING and ELY, Circuit Judges.

ELY, Circuit Judge:

Pursuant to Section 10(f) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 160(f), Authorized Air Conditioning, Inc. ("the Company") petitions for review of a final order of the National Labor Relations Board ("the Board"). The Board found that the Company had violated Sections 8(a)(1) and (5) of the Act, 29 U.S.C. §§ 158(a)(1) and (5), by the Company's refusal to execute and abide by a collective-bargaining agreement negotiated by a multi-employer bargaining association ("the Multi-Employer Association")[1] of which the Company was once a member. The Board's Decision and Order is reported at 236 N.L.R.B. No. 24 (1978). The Board cross-petitions for enforcement of its Order.

The Company is a heating, cooling, and air-conditioning contractor in the building and construction industry,

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[1]Inland Air-Conditioning and Refrigeration Contractors Association, Inc.

and it operates primarily in the Southern California area. At all relevant times herein, Paul Osborne was its president and general manager. In July of 1974, Osborne approached Paul Healy, the business manager of Local 509,[2] to discuss the possibility of employing Local 509 members. On September 9, 1974, Osborne signed on the Company's behalf a collective-bargaining agreement that consisted of two documents. The first was the Standard Form of Union Agreement ("Standard Form"), a contract negotiated by the Sheet Metal Workers International Association and the Sheet Metal and Air-Conditioning Contractor's National Association ("the National Association")—the latter being the parent organization of the Multi-Employer Association. The second document was an Addenum to the Standard Form ("Addendum") which was negotiated by Local 509 and the Multi-Employer Association. Both documents, by their terms, were to be effective until July 31, 1976.

At the time the Company signed the collective-bargaining agreement, Osborne also signed a Notice of New Shop Contract which listed five persons as the employees of the Company as of September 9, 1974. At that time, none of the Company's employees were members of Local 509 or had otherwise authorized the Union to represent them. The collective-bargaining agreement was therefore a pre-hire agreement as provided in Section 8(f) of the Act, 29 U.S.C. § 158(f).[3]

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[2]Local 509, Sheet Metal Workers International Association, AFL-CIO (hereinafter "Local 509" or "the Union").

[3]It is not an unfair labor practice for an employer engaged primarily in the building and construction industry to enter into a collective-bargaining agreement with a union that has not attained majority status prior to the execution of the agreement. 29 U.S.C. § 158(f); NLRB v. Iron Workers, 434 U.S. 335, 337-38 (1978).

Article V, Section 1 of the Standard Form contains a closed shop provision whereby the employer agrees to require membership in the Union within eight days of an employee's first day of work as a condition of continued employment.[4] When he signed the Standard Form, however, Osborne was told by Healy that the Company's employees would have thirty days to sign membership applications with Local 509. On October 9, 1974, four of the five employees listed on the Notice of New Shop Contract had filled out Union membership applications. The fifth employee was an apprentice.[5]

On September 29, 1975, while the collective-bargaining agreement was still in effect, the Company submitted applications for membership in the Multi-Employer Association and its parent organization, the National Association. Both are trade associations engaged in legislative, public relations, architectural, and labor relations activities in the sheet metal and air-condition-

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[4]Article V, Section 1 of the Standard Form provides:

ARTICLE V

SECTION 1. The Employer agrees to require membership in the Union, as a condition of continued employment of all employees performing any of the work specified in Article I of this Agreement, within eight (8) days following the beginning of such employment or the effective date of this Agreement, whichever is the later, provided the Employer has reasonable ground for believing that membership is available to such employees on the same terms and conditions generally applicable to other members and that membership is not denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fee uniformly required as a condition of acquiring or retaining membership.

[5]Although the Company disputes the Board's finding with respect to both the number of employees at the Company on October 9, 1974, and the number of those employees who became Local 509 members, we find the Board's finding to be clearly supported by substantial evidence and thus reject the Company's contentions in this regard.

ing industry. The Multi-Employer Association is also the exclusive collective-bargaining representative for its members in a specified area of Southern California. The Multi-Employer Association's Application for Membership Form ("Application") is a one-page document with the same type-face throughout. It contains only three paragraphs of text, the latter two of which state as follows:

> The undersigned hereby applies for membership in the INLAND AIR CONDITIONING AND REFRIGERATION CONTRACTORS ASSOCIATION INC., and in connection therewith hereby states and agrees:
>
> * * *
>
> 2. That if admitted to membership the undersigned will abide and be bound by all the provisions of the Articles of Incorporation and By-laws of the Corporation as they now exist and as they may be amended, and will thereby, and also by virtue of this application, become a party to and be bound by the existing labor agreements between Sheet Metal Workers International Association Local Union 509 AFL-CIO and/or United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry, Local Unions 364 and 398 AFL-CIO and the Inland Air Conditioning and Refrigeration Contractors Association Inc. Receipt of copies of the Articles, By-laws and labor agreements now in force is hereby acknowledged.
>
> 3. The INLAND AIR CONDITIONING AND REFRIGERATION CONTRACTORS ASSOCIATION, INC., is hereby designated as the sole and exclusive collective bargaining representative for and on behalf of the undersigned, and the Corporation and its Officers and other designated representatives are authorized to execute any and all labor agreements and documents which are to be binding upon the members of the Corporation in accordance with the By-laws.[6]

[6]The By-laws of the Multi-Employer Association ("By-laws") contain a provision that restates the requirements of Paragraph 3 of the Application. Article X of the By-laws provides in pertinent part:

ARTICLE X

Section 1: Collective Bargaining: Each regular member herewith appoints the Corporation and its Board of Directors or its nominee as exclusive collective bargaining agent in dealing with any labor organization affecting the air conditioning, refrigeration or sheet metal industry. Each regular member grants complete and exclusive authority to the Corporation aforesaid to do any of the following:

A. Negotiate, conclude and execute contracts which bind the Corporation and its members, jointly and severally.

B. Administer collective bargaining and trust agreements and make settlements, decisions and agreements interpreting and applying any agreement which action shall be binding upon the Corporation and its members.

C. Obtain rulings before any court or agency concerning any tax or other aspect of any contract, agreement or trust fund to which the Corporation or any member is a party, and to comply with the filing or reporting requirements of any State or Federal Law with reference thereto.

Section 2: Members hereby are expressly bound to take joint and united action in support of each other and the Corporation in dealing with any labor organization and each member:

A. Shall deem any economic action by any labor organization against any member as a like action against all members and against the Corporation, when so declared by the Board of Directors.

B. Shall suspend or operate business or employ or not employ employees represented by any Union at such times and places as directed by the Board of Directors.

(This footnote is continued on next page)

Paragraph 2 of the Application requires the Company to be bound by one of two existing labor agreements between the Multi-Employer Association and the unions that had established bargaining relations with it. One of these agreements was the same as the Company's collective-bargaining agreement with Local 509, and thus the Company satisfied the requirement of Paragraph 2.

By letter dated December 18, 1975, the Company was notified that it had been accepted as a member of the Multi-Employer Association and its parent, the National Association. The letter indicated that the by-laws of both organizations were enclosed. At the time the Company's Application was accepted, a majority of the Company's employees were not members of Local 509, and the closed shop provision in the Standard Form was not being enforced.

On February 26, 1976, Local 509 gave the Multi-Employer Association timely notice of its intent to

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C. Shall not operate a job while other members are shut down, when so declared by the Board of Directors.

D. Shall not sign any Union agreement individually with any Union with which the Corporation bargains in behalf of its members.

E. Shall not individually or through any agent, negotiate or deal separately with any Union with which the Corporation bargains in behalf of its members.

F. Shall not entice any employees from any other member in any manner. Payment over wage bargaining agreements signed by the Corporation shall constitute enticement.

G. Shall refer to the Corporation all disputes or problems and interpretations arising between any employee, and Union and the member in relation to any Union.

H. Shall be bound by all decisions and interpretation issued by the Corporation affecting the labor relations between a member and employee.

reopen its agreement with the multi-employer bargaining unit. Negotiations commenced on May 20, 1976. In late June of that year, the Multi-Employer Association provided Local 509 with a list of its members. The Company was included in that list. By August 4, 1976, the only remaining unresolved issue in the negotiations was wages. On August 9, 1976, the parties, being unable to reach a concensus, submitted the wage issue to a third party, the National Joint Adjustment Board ("NJAB"), as provided in the respective labor agreements. On August 11th, the NJAB issued a unanimous decision setting forth the wage increase to be included in the new contract and provided that the contract would be effective from August 1, 1976 through July 31, 1978. The Multi-Employer Association and Local 509 entered into the new collective-bargaining agreement, and Local 509 began to contact the individual members of the Multi-Employer Association in order to secure their signatures on the new contract.

In a letter dated July 14, 1976, the Company notified the Multi-Employer Association of its intent to withdraw from membership in the unit effective June 1, 1976.[7] Article VI, Section 4(a) of the By-laws provides that a member may not resign or withdraw within four months prior to or after the termination date of any collective-bargaining agreement of which the Multi-Employer Association is a party and which covers the members' employees. It also provided that a member's resignation became effective only upon acceptance

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[7]The Company apparently had verbally contacted the Multi-Employer Association on a number of prior occasions beginning in February, 1976 as to its desire to withdraw from the trade association.

by the Board of Directors of the Multi-Employer Association. Because the Board of Directors found the Company's request for withdrawal to be untimely under the By-laws, it took no action with respect to the Company's letter.

In late August, 1976, the business manager for Local 509 contacted Osborne and asked that the Company sign the new bargaining agreement negotiated by the Multi-Employer Association. Osborne refused on the grounds that the Company was no longer a member of the multi-employer bargaining unit and because the "wages are too high" in the new contract. Thereafter, the Company failed to make any of the required payments to the health and pension funds of its employees as were provided for in the new bargaining agreement.

The Board, in agreement with the Administrative Law Judge, found that the Company had violated Sections 8(a)(1) and (5) of the Act by refusing to sign the new collective-bargaining agreements and to abide by the terms therein. The Board's Order requires the Company to recognize and bargain with the Union as the representative of its employees in the appropriate unit, to sign and implement the new collective-bargaining agreement and give it retroactive effect, to make its employees whole for any losses resulting from the Company's refusal to bargain, and to post appropriate notices.

Two overriding issues are presented: (I) whether the Company was, in fact, a member of the Multi-Employer Association during the relevant period herein, and (II) whether Local 509 represented a majority of the employees in the relevant unit at the time of the Company's refusal to sign the new collective-bargaining agreement and to abide by its terms.

I.

The Company's Membership in the Multi-Employer Association.

The Company contends that it was not a member of the Multi-Employer Association during the relevant periods herein because (1) the Company did not express an unequivocal intent to be bound by the multi-employer unit for purposes of collective bargaining; (2) Local 509 failed to give timely consent to the Company's inclusion in the multi-employer unit; (3) the Company's employees were not effectively merged into the Multi-Employer Association because a majority had not consented to representation by Local 509; and (4) the Company effectively withdrew from the bargaining unit. We reject these contentions for the reasons outlined below.

(1) *Evidence of Unequivocal Intent*

Paragraph 3 of the Application, quoted *supra*, clearly and unequivocally states that the Mutli-Employer Association is "hereby designated as the sole and exclusive collective bargaining representative for and on behalf of the undersigned." Likewise, Article X of the By-laws gives the Multi-Employer Association the authority to act as the Company's sole representative for purposes of collective bargaining.

Osborne claimed that he did not read the Application before signing it. Instead, the Company asserted that it applied for membership in the Multi-Employer Association merely to obtain certain trade manuals and documents. The Administrative Law Judge found that this testimony was not credible, and the Board adopted that finding. This Court will not disturb credibility resolutions unless a clear preponderance of evidence in the record shows that they are incorrect. *NLRB*

v. Pacific Intern. Rice Mills, Inc., 594 F.2d 1323, 1326 (9th Cir. 1979). Given the fact that the Application was only a one-page document on which the type is reasonably large and uniform, it is somewhat difficult to believe that Osborne failed to notice Paragraph 3 which rests conveniently in the center of the page. Moreover, there was testimony that the manuals and documents the Company allegedly sought were already available to it with no requirement that the Company join the Multi-Employer Association. In sum, there is substantial evidence to support the Board's finding that the Company intended to become part of the multi-employer unit and to delegate authority to the Multi-Employer Association to negotiate on the Company's behalf.

(2) *The Union's Consent*

The Company correctly points out that before a particular employer can become part of an established multi-employer unit, the "already committed parties", which includes the union, must agree to the newcomer's participation. *The Hammet Co. Inc.*, 206 N.L.R.B. No. 56 at 680 (1973). The Company contends that there was no timely consent by Local 509 herein as it was not aware of the Company's membership in the Multi-Employer Association until August, 1976, after the conclusion of the negotiations for a new collective-bargaining agreement.

No specific formalities are required to evidence an intent by a union to accept an employer bargaining group. *See NLRB v. Bagel Bakers Council of Greater New York*, 434 F.2d 884, 886-87 (2d Cir.), *cert. denied*, 402 U.S. 908 (1971). Similarly, no formal or special evidence of acceptance is required of the

union when a new employer is added to the unit so long as the union has an opportunity to voice its objections to the newcomer but does not.[8]

In the present case, contrary to the Company's claim, Local 509 was given a list of the Multi-Employer Association's members, which included the Company, in June of 1976. At no time herein did Local 509 object to the Company's inclusion in the multi-employer unit. Indeed, after the new collective-bargaining agreement had been reached, the Union sought the Company's signature on the new contract. We find, as did the Board, that such facts evidence the necessary consent by the Union to the Company's inclusion within the Multi-Employer Association. As to the Company's contention that the consent must be "timely," we find no case that discusses this requisite, if it exists at all. The Board did not find the Union's consent to be untimely, and we shall not disturb that determination, essentially factual, in the circumstances of this case.

(3) *Employees Merged Into Multi-Employer Association*

Generally, an employer may not unilaterally and without the express or implied consent of its employees bind them to representation in a multi-employer unit. *See, e.g., Mohawk Business Machines Corp.*, 116 N.L.R.B. No. 28 at 249 (1956). The Company contends that its employees were not effectively merged into the Multi-Employer Association because the Union

[8] *Cf.* Fairmont Foods Co. v. NLRB, 471 F.2d 1170, 1173 (8th Cir. 1973) (where it was held that a union's silence as to an employer's withdrawal from a multi-employer unit after receiving notice thereof, coupled with its continuation of normal relations with the remaining employers, constituted an "implied consent" to the withdrawal).

did not enjoy majority status at the time the Company applied for membership and was accepted into the multi-employer unit. The argument must be rejected.

As the Supreme Court noted less than two years ago, "It is also undisputed that when the union successfully seeks majority support, the prehire agreement attains the status of a collective-bargaining agreement executed by the employer with a union representing a majority of the employees in the unit." *NLRB v. Iron Workers*, 434 U.S. 335, 349-50 (1978). *See also id.* at 351 n.12 ("One-time majority status, coupled with a union security clause that has been enforced, gives rise to a rebuttable presumption of continued majority status, in the Board's view. See *R. J. Smith*, 191 N.L.R.B., at 695."). It is clear from the record in this case that a majority of the Company's employees became Local 509 members shortly after the signing of the pre-hire agreement and well before the Company became a member in the Multi-Employer Association.[9] Thus, once a majority of the Company's employees joined the Union, a rebuttable presumption of the Union's majority status was created. We also note that the union security clause, a part of the pre-hire agreement, was enforced, at least initially, after the agreement was entered into.

In addition, however, the Company contends that this presumption was successfully rebutted by evidence indicating that only a minority of its employees were Union members when, for example, the Company's application for membership in the multi-employer unit

[9]Even the Company concedes that Local 509 members constituted a majority of its work complement in two months during the effective period of the bargaining agreement and before the Company applied for and became a member in the Multi-Employer Association.

was approved in December of 1975. This evidence alone, however, is not sufficient to rebut the presumption of majority status in the circumstances of this case. It is well established that union membership is not always an accurate barometer of union support. *NLRB v. Tahoe Nugget, Inc.*, 584 F.2d 293, 307 (9th Cir.), *cert. denied*, ... U.S. .... (1979); *Sahara-Tahoe Corp. v. NLRB*, 581 F.2d 767, 772 (9th Cir.), *cert. denied*, ... U.S. .... (1979); *NLRB v. Vegas Vic, Inc.*, 546 F.2d 828, 829 (9th Cir.), *cert. denied*, 434 U.S. 818 (1978). The Board concluded that the Company did not rebut the presumption of majority status applicable here. We hold that the Board's determination in this respect is supported by the evidence.

(4) *Attempt to Withdraw*

Prior to the commencement of negotiations, either the Union or the individual employer may unilaterally withdraw from a multi-employer bargaining relationship if adequate written notice is given that evinces an unambiguous intent to withdraw. *NLRB v. Beck Engraving Co., Inc.*, 522 F.2d 475, 481 (3rd Cir. 1975). It is well established, however, that withdrawal from a multi-employer unit is untimely if attempted after the commencement of bargaining negotiations. *See, e.g., McAx Sign Co., Inc. v. NLRB*, 576 F.2d 62, 67-68 (5th Cir. 1978), *cert. denied*, ... U.S. .... (1979); *NLRB v. Central Plumbing Co.*, 492 F.2d 1252, (6th Cir. 1974); *NLRB v. Tulsa Sheet Metal Works, Inc.*, 367 F.2d 55, 57 (10th Cir. 1966). "This rule is intended to minimize disruption of the bargaining process by preventing an employer from using the threat of withdrawal as a 'bargaining lever.'" *McAx Sign Co., supra*, at 68. *See also NLRB v. Sheridan Creations, Inc.*, 357 F.2d 245, 247-48 (2d Cir. 1966).

The Company's attempt to withdraw from the multi-employer unit was not successful for a number of reasons. First, the withdrawal was untimely as a matter of law since the negotiations between Local 509 and the Multi-Employer Association commenced on May 20, 1976, and Local 509 did not consent to the Company's withdrawal. There was, in fact, no evidence that the Company ever notified the Union of its intent to withdraw prior to the time that the new collective-bargaining agreement was finalized. We note also that the Company failed to secure the approval of the Multi-Employer Association's Board of Directors as required under Article VI, Section 4 of the By-laws. Moreover, the withdrawal was precluded by this portion of the By-laws which required continued membership for four months prior to and after the termination date of any collective-bargaining agreement covering a member's employees of which the Multi-Employer Association was also a party.

(5) *Impasse in Negotiations*

During the course of negotiations, withdrawal from a multi-employer bargaining unit is permissible if an "unusual circumstance" occurs. *NLRB v. Associated Shower Door Co.*, 512 F.2d 230, 232 (9th Cir.), *cert. denied*, 423 U.S. 893 (1975). The only unusual circumstance, as the term has been used by the Board and the courts, that is raised by the Company is an alleged impasse in negotiations.[10] The Courts

[10]The Company contends that another "unusual circumstance" existed in that it had merely been a nominal, non-participating member in the Multi-Employer Association for a short time prior to its request to withdraw. No case supporting this position is cited, and we do not find that such facts constitute sufficient reason or justification to permit a unilateral withdrawal during negotiations.

of Appeals have consistently recognized an impasse in negotiations as justification for a unilateral withdrawal from a multi-employer unit. *E.g., NLRB v. Acme Wire Works, Inc.*, 582 F.2d 153, 156-57 (2d Cir. 1978); *NLRB v. Beck Engraving Co., Inc.*, 522 F.2d 475, 483 (3rd Cir. 1975); *NLRB v. Associated Shower Door Co.*, 512 F.2d 230, 232 (9th Cir.), *cert. denied*, 423 U.S. 893 (1975); *NLRB v. Hi-Way Billboards, Inc.*, 500 F.2d 181, 182-83 (5th Cir. 1974); *Fairmont Foods Co. v. NLRB*, 471 F.2d 1170, 1172-73 (8th Cir. 1972).

The Administrative Law Judge, however, found that there was no evidence of an impasse. The Board adopted this finding, and we cannot conscientiously hold that the finding is not supported by substantial evidence. The fact that an employer is not happy with the result of group bargaining does not indicate an impasse. *NLRB v. Central Plumbing Co.*, 492 F.2d 1252, 1254 (6th Cir. 1974). The period between May 20, 1976 and August 9, 1976 is not alleged to have been an overly lengthy time for the bargaining. The Company does not claim that it was suffering economic hardship as a result of the length of the negotiations. Moreover, until August 5 when the deadlock as to wages became apparent, there is little, if anything, in the record to indicate that the negotiations had not been proceeding in a normal fashion. Further, the parties had previously agreed upon a binding method of resolving any deadlocks, *i.e.*, submission of the issue to the NJAB. While the Company contends that the Union had threatened to strike if the NJAB itself deadlocked, the mere threat of a strike is not an unusual circumstance justifying withdrawal in the circumstances of this case. Finally, we note that at the

time the Company notified the Multi-Employer Association of its intent to withdraw (July 14, 1976 letter), there clearly was no evidence of any impasse. *Cf., NLRB v. Johnson Sheet Metal, Inc.*, 442 F.2d 1056, 1060 (10th Cir. 1971) (attempt to withdraw came after negotiations had resumed and whatever impasse may have existed had ended).

II.

The Union's Majority Status at the Time of the Company's Refusal to Sign the New Agreement.

As recently stated by our own court,

> To sustain an 8(a)(5) charge, the General Counsel must show the union represented a majority of the unit employees when the employer refused to bargan. The Board employs two presumptions obviating an evidentiary showing of majority status. For a reasonable time, usually one year, after certification or voluntary recognition, majority support is irrebuttably presumed absent "unusual circumstances." After one year, the presumption becomes rebuttable. Absent sufficient countervailing proof, the presumption establishes, without more, the employer's duty to bargain. *NLRB v. Tesoro Petroleum Corp.*, 431 F.2d 95, 97 (9th Cir. 1970).
>
> * * *
>
> The presumption is rebutted if the employer shows, by clear, cogent, and convincing evidence that the union was in the minority or that the employer had a good faith reasonable doubt of majority support at the time of the refusal. (footnotes omitted).

NLRB v. Tahoe Nugget, Inc., 584 F.2d 293, 297 (9th Cir.), *cert. denied*, ... U.S. .... (1979). *Accord, Sahara-Tahoe Corp. v. NLRB*, 581 F.2d 767, 769 (9th Cir.), *cert. denied*, ... U.S. .... (1979).

The Company contends that the Union did not enjoy a presumption of majority status at the relevant times herein, and that even if such a presumption did exist, the Company effectively rebutted the presumption by pointing out that only a minority of its employees were Local 509 members. These arguments, of course, parallel those made in connection with the Company's application for membership and acceptance into the Multi-Employer Association. *See* Part I(3), *supra*. We reject the Company's arguments in this context for similar reasons.

The contentions presented in the Petition for Review are rejected, and the Board's Order will be

ENFORCED.

APPENDIX B.

Decision and Order.

236 NLRB No. 24

JPM, D—3274, Pomona, Calif.

United States of America Before the National Labor Relations Board.

Authorized Air Conditioning Co. and Sheet Metal Workers' International Association, Local Union No. 509. Case 21—CA—15160.

On July 29, 1977, Administrative Law Judge Earldean V. S. Robbins issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, to modify her remedy,[1] and to adopt her recommended Order.[2]

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[1]The Administrative Law Judge inadvertently omitted from her remedy the manner in which backpay shall be computed. Accordingly, we shall modify her remedy so that backpay is computed as set forth in *F. W. Woolworth Company,* 90 NLRB 289 (1950), and interest thereon as prescribed in *Florida Steel Corporation,* 231 NLRB No. 117 (1977). See, generally, *Isis Plumbing & Heating Co.,* 138 NLRB 716 (1962).

[2]Respondent's reliance on *David F. Irvin and James B. McKelvy, partners, d/b/a The Irvin-McKelvy Company,* 194 NLRB 52 (1971), and other cases involving bargaining relationships under Sec. 8(f) is misplaced. No question of majority has been raised in the appropriate multiemployer unit, and the representative status of the Union among Respondent's employees is immaterial as those employees constitute only a small segment of the appropriate unit.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Adminstrative Law Judge and hereby orders that the Respondent, Authorized Air Conditioning Co., Pomona, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. May 16, 1978

Howard Jenkins, Jr., *Member*
John A. Penello, *Member*
Betty Southard Murphy, *Member*
NATIONAL LABOR RELATIONS BOARD

(SEAL)

JD-(SF)-159-77, Pomona, Calif.

United States of America Before the National Labor Relations Board, Division of Judges, Branch Office, San Francisco, California.

Authorized Air Conditioning Co. and Sheet Metal Workers' International Association, Local Union No. 509. Case No. 21-CA-15160.

Lana H. Parke, Esq., of Los Angeles, Calif., for the General Counsel.

Walter C. Appling, Esq., of *Richman & Garrett,* Los Angeles, Calif., for the Charging Party.

John W. Prager, Jr., Esq., of *Tyre & Kamins,* Los Angeles, Calif., for the Respondent.

DECISION

Statement of the Case

EARLDEAN V.S. ROBBINS, Administrative Law Judge: This case was tried before me in Los Angeles, California, on May 17 and 18, 1977. The charge was filed by Sheet Metal Workers' International Association, Local Union No. 509, herein called the Union, or Local 509, on October 26, 1976, and a copy thereof was served on Respondent on November 8, 1976. The complaint which issued on December 15, 1976, alleges that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act. Post-trial briefs were filed by the General Counsel and by the Respondent.

The basic issue herein is whether Respondent is bound by a collective-bargaining agreement entered into by the Inland Air Conditioning and Refrigeration Contractors Association, Inc., herein called the Association, on behalf of its members.

Upon the entire record, including my observation of the witnesses and after due consideration of the briefs filed by the parties, I make the following:

Findings of Fact

I. Commerce

Respondent, a California cororation, is a heating, cooling, and air conditioning contractor in the building and construction industry, with an office located in Pomona, California. The complaint alleges, and I find as more fully set forth below, that at all times material herein Respondent has been an employer-member of the Inland Air Conditioning and Refrigeration Contractors Association, Inc., and has delegated authority to the Association to represent it for purposes of collective bargaining with labor organizations.

The complaint alleges, and I find, the Association is a voluntary association of employers with its headquarters located in Riverside, California, which admits to membership employers engaged in Southern California in the sheet metal, air conditioning and refrigeration industry, and exists, in part, for the purpose of bargaining with labor organizations concerning wages, hours, and working conditions of employees employed by its employer-members, including Wright's Manufacturing, Incorporated. Most of its members are in the building and construction industry.

Wright's is a California corporation engaged in the manufacture of sheet metal flashings, duct work, and plenum curbs at various facilities located in the State of California, from which it annually ships and sells goods and products valued in excess of $50,000 directly to customers outside the State of California.

Upon the pleading and the evidence, I find that the Association and its employer-members, including Respondent, are now, and have been at all times material herein, employers within the meaning of Section 2(2) of the Act, engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. Labor Organization

The complaint alleges, the answer admits, and I find that the Union is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *Facts*

Prior to July 1974, Respondent had been engaged in the heating and air conditioning industry in the Greater Los Angeles Area and as a consequence thereof had some dealing with Sheet Metal Workers' International Association, Local Union No. 108, herein called Local 108. Around July 1974, Respondent's president, Paul Osborne, contacted Paul Healy, business manager for Local 509, informed him that Respondent planned to open a shop in Pomona and wished to sign a collective-bargaining agreement with Local 509.

On September 9, 1974, Osborne, on behalf of Respondent, signed the Standard Form of Union Agreement for the sheet metal, roofing, ventilating and air conditioning contracting divisions of the construction industry,[1] and also signed the Local 509 Addenda to Standard Form of Union Agreement.[2] The standard agreement and the addenda are both effective by their terms until July 31, 1976.

As of September 9, 1974, none of Respondent's employees were members of the Union or had otherwise authorized the Union to represent them in collective bargaining. However, the standard agreement provides:

ARTICLE V.

SECTION 1. The Employer agrees to require membership in the Union, as a condition of continued

[1]This agreement is negotiated by the Sheet Metal Workers' International Association and the Sheet Metal and Air Conditioning Contractors National Association.

[2]The addenda is negotiated by Local 509 and Inland Air Conditioning & Refrigeration Contractors Association, Inc.

employment of all employees performing any of the work specified in Article I of this Agreement, within eight (8) days following the beginning of such employment or the effective date of this Agreement, whichever is the later, provided the Employer has reasonable ground for believing that membership is available to such employees on the same terms and conditions generally applicable to other members and that membership is not denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fee uniformly required as a condition of acquiring or retaining membership.

At the time of the signing of the agreement, Osborne signed a Notice of New Shop Contract which lists five persons as the employees of Respondent as of September 9, 1974. Healy told Osborne that Respondent's employees would have 30 days to sign applications for membership. On October 9, 1974, four of the five persons listed on the Notice of New Shop Contract signed applications for membership in the Union.[3]

On September 29, 1975, Respondent applied for membership in the Association and in its parent organization, Sheet Metal and Air Conditioning Contractors' National Association, Inc., herein called SMACNA. The Association application provides:

The undersigned hereby applies for membership in the INLAND AIR CONDITIONING AND REFRIGERATION CONTRACTORS ASSOCIATION INC., and in connection therewith hereby states and agrees:

1. That the undersigned is a licensed contractor engaged in the air conditioning, refrigeration and/or sheet metal industry within the San Bernardino and Riverside Counties and the Pomona Trading Area.

[3]The fifth person was an apprentice.

2. That if admitted to membership the undersigned will abide and be bound by all the provisions of the Articles of Incorporation and By-laws of the Corporation as they now exist and as they may be amended, and will thereby, and also by virtue of this application, become a party to and be bound by the existingt labor agreements between Sheet Metal Workers International Association Local Union 509 AFL-CIO and/or United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry, Local Unions 364 and 398 AFL-CIO and the Inland Air Conditioning and Refrigeration Contractors Association Inc. Receipt of copies of the Articles, By-laws and labor agreements now in force is hereby acknowledged.

3. The INLAND AIR CONDITIONING AND REFRIGERATION CONTRACTORS ASSOCIATION. INC., is hereby designated as the sole and exclusive collective bargaining representative for and on behalf of the undersigned, and the Corporation and its Officers and other designated representatives are authorized to execute any and all labor agreements and documents which are to be binding upon the members of the Corporation in accordance with the By-laws.

By letter dated December 18, Respondent was notified that it had been accepted into membership both in the Association and in SMACNA. The letter further stated that the bylaws of both organizations were enclosed.[4] The Association bylaws provide *inter alia*:

ARTICLE X

Section 1: Collective bargaining: Each regular member herewith appoints the Corporation and its Board of

[4]Osborne does not deny that the bylaws were enclosed but claims he never saw them.

Directors or its nominee as exclusive collective bargaining agent in dealing with any labor organization affecting the air conditioning, refrigeration or sheet metal industry. Each regular member grants complete and exclusive authority to the Corporation aforesaid to do any of the following:

A. Negotiate, conclude and execute contracts which bind the Corporation and its members, jointly and severally.

B. Administer collective bargaining and trust agreements and make settlements, decisions and agreements interpreting and applying any agreement which action shall be binding upon the Corporation and its members.

C. Obtain rulings before any court or agency concerning any tax or other aspects of any contract, agreement or trust fund to which the Corporation or any member is a party, and to comply with the filing or reporting requirements of any State or Federal Law with reference thereto.

On February 26, 1976,[5] the Union gave the Association timely notice of intent to reopen the agreement. The first of 11 negotiating sessions was held on May 26. Some time in late June, the Association provided the Union with a list of its members, including Respondent.

By letter dated July 14, Respondent notified the Association that it wished to withdraw its membership effective as of June 1.[6] No notice was given to the

[5]All dates hereinafter will be 1976 unless otherwise indicated.

[6]According to Osborne, he told Boyer in February that economically Respondent could not afford membership in the Association and would have to withdraw. Boyer said he would

(This footnote is continued on next page)

Union. Donald Boyer, executive secretary of the Association, creditably testified the letter was presented to the Association's board of directors at the next meeting following July 14 but it was not acted upon because it was untimely.

The association bylaws provide:

ARTICLE VI
Membership

* * * *

Section 4: Termination of Membership. Any member of the Corporation, whose dues are currently paid and is otherwise in good standing may resign at any time, except as hereinafter stated. Timely resignations must be presented in writing to the Board of Directors who shall act upon them on or before their second meeting following their receipt. However, such resignations shall become effective only upon acceptance by the Board of Directors. No resignation shall be accepted if the member resigning is indebted to the Corporation.

A. Any person, firm, or corporation becoming a member of the Corporation shall continue his membership during the four (4) months periods prior to and continuing through four (4) months after the termination date of

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have Carl Johnson contact Osborne. Upon speaking to Johnson, Osborne was dissuaded from resigning upon the representation that valuable new manuals would soon be distributed to members. In April, according to Osborne, he again told Boyer Respondent was going to resign from association membership. Boyer said he would have Johnson contact Osborne, which Johnson did in late May. They had basically the same conversation, but Osborne insisted that Respondent was going to have to resign its membership. However, no further step was taken until the July 14 letter. Johnson did not testify. Boyer testified that he recalls no such conversation.

any collective bargaining contract to which this Corporation is a party and which covers employees of said member.

* * * *

By the August 4 negotiation session the only item remaining in dispute was wages. Failing to resolve this disputed item, the Union and the Association referred the dispute to the National Joint Adjustment Board pursuant to article X, section 8 of the 1973-1976 contract, which by its terms remain in effect after notice of reopening has been served until all conferences relating thereto have been terminated by either party.

That section provides that "should the negotiations for renewal of this Agreement become deadlocked" notice is to be given to SMACNA and the president of the International. Thereafter, certain conciliation steps are to be taken at the national level in an attempt to resolve the dispute. Should conciliation fail, the dispute shall be submitted to the National Joint Adjustment Board. "The unanimous decision of said Board shall be final and binding upon the parties. . . . There shall be no cessation of work by strike or lockout unless and until said Board fails to reach a unanimous decision and the parties have received written notification of its failure." It further provides that:

> Unless a different date is agreed upon mutually between the parties or is directed by the unanimous decision of the National Joint Adjustment Board, all effective dates in the new agreement shall be retroactive to the date immediately following the expiration date of the expiring agreement.

On August 11, the National Joint Adjustment Board issued a unanimous decision setting forth the wage increase to be included in the contract and providing that the contract term shall be from August 1, 1976, through July 31, 1978. Within 2 or 3 days thereafter the Association and the Union signed the new standard agreement and addenda. The Union then proceeded to secure the signature of the individual association members on the new agreement.

According to the Union's Business Manager Gordon Jones, when ae asked Osborne to sign, Osborne said his partner in Long Beach had advised him not to sign. Jones explained the agreement had been reached with the Association, Respondent was a member of the Association, and the agreement had been negotiated in good faith on behalf of the employer-members. Osborne said Respondent had resigned from the Association. Jones said he had not been so notified and he would check with the Association.

After contacting the Association and learning that Respondent's letter of resignation was untimely, Gordon again requested that Osborne sign the agreement. Osborne again refused. Osborne admits that he refused to sign the agreement. He testified that in August or September Jones telephoned him and requested that Respondent sign a new agreement. Osborne said he was concerned that there had been some wage increases. Jones said there had been. Osborne said he would not sign the agreement if there had been wage increases. Jones said Respondent was bound by the agreement because of the Association. About a week later Jones again telephoned Osborne. According to Osborne, Jones expressed concern because "he wanted me as a member of Local 509." Osborne said his position had not

changed, he felt the wages were too high and he did not want to sign. Jones said that as a member of SMACNA Osborne had to sign, he had no choice. Jones then said "I'm really sorry that you don't want to be a member, can I ask why." Osborne replied, "it's because the wages are too high." Jones then said he would have to check but it was his understanding that Respondent had no choice, that Respondent was a member of the Association and would have to sign.

Osborne further testified that in May 1976 he asked Jones what he thought the new contract terms would be. Jones said he did not expect much change, that he would try and get the membership to accept a contract much the same as the expiring contract. Osborne said he did not think the market would bear higher wages, that he knew Respondent could not. Jones said he was certain wages would not be increased significantly. Osborne denies mentioning a partner in Long Beach or even having a partner in Long Beach.

Respondent ceased making payments to the health and welfare and pension funds in April 1976, allegedly because of clerical problems. He made no payments under the 1976-1978 contract.

B. *Conclusion*

It is clear that the Association is a multi-employer bargaining association. Its bylaws indicate mutual assent of its members to be bound by a collective-bargaining agreement resulting from multi-employer bargaining. The record establishes a history of bargaining in a multi-employer bargaining unit since at least 1965, and there have been successive collective-bargaining agreements between the Union and the Association, on behalf of its members, since at least 1965. These

agreements cover all employees of the employers who perform work within the jurisdiction of Local 509, which is specifically set forth in the standard agreement and clarified in the addenda. They contain union-security provisions requiring employees to join the Union and provisions requiring the employers to use the hiring hall administered by the Union. Thus employees may work for various employers within the bargaining group. The agreements provide common coverage for employees under health, welfare and pension plans to which the employers make contributions and provide for uniform wage scales and working conditions. There is no evidence that majority has ever been questioned and no evidence to overcome a presumption of majority.

In these circumstances, I find that all employees employed by the employer-members of Inland Air Conditioning and Refrigeration Contractors Association, Inc., in the manufacture, fabrication, assembling, handling, erection, installation, dismantling, conditioning, adjustment, alteration, repairing, servicing and maintenance of all types of material and equipment used in the heating, cooling and air conditioning industry, kitchen equipment and cafeteria equipment industry, metal building industry, and all other sheet metal divisions, including all detailing used for shop fabricating, field erection and air balancing, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. I further find that, since at least 1965, Local 509 has been the exclusive majority representative for the purposes of collective bargaining of the employees in the above-described unit. *Wayne Electric Inc.; and Electric Installation and Services,* 226 NLRB No. 59.

Respondent argues, however, that it never became part of the multi-employer bargaining unit and thus no presumption of majority status flows from the collective-bargaining agreement between the Association and Local 509. Specifically, Respondent argues that it did not know that by joining the Association, it was becoming a part of a multi-employer unit. I find this argument unpersuasive. The application for membership clearly states that Respondent agrees to become a party to and be bound by existing labor agreements between the Association and the Union, designates the Association as Respondent's bargaining representative and authorizes the Association to execute any labor agreements which are to be binding upon the members of the Association in accordance with the Association bylaws.

The bylaws specifically state that the Association has authority to negotiate and execute agreements which bind its members jointly and severally, that members are expressly bound to take joint and united action in dealing with any labor organization, and that members shall not negotiate or deal separately with, or sign any agreement individually with any union with which the Association bargains in behalf of its members. This evinces an unequivocal intention to be bound in collective bargaining by group rather than individual action. *Council of Bagel and Bialy Bakeries and its Employer Members,* 175 NLRB 902, 903.

I do not credit Osborne's testimony that he did not read the application before signing it. It is a one-page document and the significant portion is contained in the top half page just above Osborne's signature. Nor do I credit Osborne's testimony that he did not read the bylaws. The application gave clear

notice that the bylaws contained something affecting Respondent's collective-bargaining obligations. Furthermore, it is irrelevant if he chose not to read the bylaws, he is bound by the agreement he signed. There is no evidence of any circumstances that might relieve him of this obligation. I have carefully considered the cases cited by Respondent as to intent and find them inapposite. Those cases involved situations where there was no actual expression of intent and the Board looked to a course of conduct to determine whether the employer had evinced an intent to be bound by multi-employer bargaining.

Respondent also argues that it only joined the Association to obtain certain specification manuals. This is refuted by the evidence. Thus, by letter dated October 22, 1975, Osborne sought counsel from the Assocation concerning a potential grievance with Local 108.

Respondent also argues that its contract with the Union was a Section 8(f) contract and that the Union did not represent a majority of its employees at the time of signing the cdontract, at the time of joining the Association, nor at the time of the refusal to sign the 1976 agreement. It is true that the Union represented none of Respondent's employees on September 9, 1974, when Respondent signed a collective-bargaining agreement with the Union. However, such a contract in the building and construction industry is valid under Section 8(f) of the Act. Although it is well established that a contract entered into pursuant to Section 8(f) does not of itself raise a presumption of majority status, *R. J. Smith Construction Co., Inc.*, 191 NLRB 693, once a majority is in fact achieved, the normal presumption of majority that flows from

a collective-bargaining agreement applies thereto. *David F. Irvin and James B. McKelvy, partners, d/b/a The Irvin-McKelvy Company*, 194 NLRB 52; *Fenix & Scisson, Inc., et al.*, 207 NLRB 752; *Williams Enterprises, Inc.*, 212 NLRB 880. The record establishes that in November 1974 a majority of the employees employed by Respondent were members of the Union. Thereafter, a presumption of majority flowed from the union contract which has not been rebutted. Mere lack of membership, turnover or expansion of unit is not sufficient to rebut the presumption.

This contract was still in force at the time Respondent joined the Association. Since the Union was then the majority representative of Respondent's employees, Respondent was free to merge them into a multi-employer unit.[7] I have found above that the Respondent, by joining the Association, evinced an intent to pursue a course of group bargaining. By the action of the Association Board of Directors, the employer-members accepted Respondent as part of the multi-employer bargaining unit. Further, the list of members provided by the Association to the Union in June during the course of negotiations listed Respondent as a member to be bound by the multi-employer bargaining. The Union raised no objections. Accordingly, I reject Respondent's argument that Local 509 did not consent to Respondent's inclusion in the multi-employer unit.

Upon the above, I find that Respondent's employees were effectively merged into the multi-employer bargaining unit. I further find that Respondent did not

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[7]I have considered, and reject, as unsupported by the record, Respondent's argument that the September 9, 1974, agreement was a "members only" contract.

timely withdraw from such unit. The association bylaws preclude resignation during a period commencing 4 months prior to and ending 4 months after the anniversary date of the collective-bargaining agreement. Respondent attempted to resign during this period. Further, it is established Board law that an employer may not withdraw from a multi-employer bargaining unit, except on mutual consent, once negotiations have commenced. *Retail Associates, Inc.*, 120 NLRB 388, 393-395. Here no mutual consent is involved and Respondent's letter of resignation is dated July 14, after negotiations had commenced.

Respondent alternatively argues that it was privileged to withdraw from the multi-employer bargaining unit because an impasse had been reached during the negotations and there was a strike threat prior thereto. *N.L.R.B. v. Hi-Way Billboards, Inc.*, 500 F.2d 181 (C.A. 5); *Fairmont Foods Company v. N.L.R.B.*, 471 F.2d 1170 (C.A. 8). Neither Board law nor the facts support this argument. There was no impasse. The parties had agreed upon a binding method of resolving negotiation disputes—submission to the National Joint Adjustment Board. An impasse would develop only if the National Joint Adjustment Board deadlocked, which did not occur. As to the strike threat, the Union merely gave notice to the employers that its membership had voted to strike in the event of a National Joint Adjustment Board deadlock. The record reveals no special circumstances which would justify an otherwise untimely withdrawal.

Upon the above, I conclude that Respondent is bound by the outcome of the multi-employer bargaining. Accordingly, I find that Respondent violated Section 8(a)(1) and (5) of the Act by its refusal to execute

and abide by the terms and conditions of the 1976 agreement negotiated between the Association and the Union.

Conclusions of Law

1. The Association, and its employer-members, including Respondent, are employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Local 509 is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees employed by the employer-members of the Association in the manufacture, fabrication, assembling, handling, erection, installation, dismantling, conditioning, adjustment, alteration, repairing, servicing and maintenance of all types of material and equipment used in the heating, cooling and air conditioning industry, kitchen equipment and cafeteria equipment industry, metal building industry, and all other sheet metal divisions, including all detailing used for shop fabricating, field erection and air balancing, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein, Local 509 has been, and, is now, the exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By failing and refusing to sign,[8] the 1976 collective-bargaining agreement between the Associa-

[8]Although the Association signs the agreement on behalf of its members, it has been the practice for each member to also sign the agreement. Further, although unclear, it appears

(This footnote is continued on next page)

tion, on behalf of its members, and Local 509 covering employees of Respondent in the above-described multi-employer bargaining unit; and by failing and refusing to abide by the terms and conditions of said collective-bargaining agreement, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, I shall recommend that Respondent be ordered to cease and desist therefrom and from like or related unfair labor practices and take certain affirmative action designed to effectuate the policies of the Act.

I have found that Respondent has violated Section 8(a)(1) and (5) of the Act by refusing to sign the 1976 collective-bargaining agreement negotiated between the Association on behalf of its members, and Local 509, and by failing and refusing to abide by the terms and coneitions of said agreement. I shall therefore recommend that Respondent sign such agreement and that it comply with the terms and conditions of said agreement, both retroactively and for the balance of its term, including payments to the appropriate source of the health and welfare and pension fund

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that section 48 of the addenda may contemplate that individual employer-members sign the contract. That section provides *inter alia*: "This contract is signed by the Inland Air Conditioning & Refrigeration Contractors Association, Inc., on behalf of its members as per the list submitted to the Union, and by the Employer."

payments provided for therein, and making employees whole for any loss of wages or benefits suffered as a result of Respondent's refusal to abide by the terms of such agreement.

[The remaining portions of the Administrative Law Judge's Remedy have been omitted.]

Upon the basis of the foregoing findings of fact, conclusions of law and the entire record in this proceeding, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I hereby recommend the following:[24]

ORDER

Respondent, Authorized Air Conditioning Co., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to sign and abide by the terms and conditions of the collective-bargaining agreement entered into by Inland Air Conditioning and Refrigeration Contractors Association Inc. and the Union in August 1976, effective by its terms from August 1, 1976, thorugh July 31, 1978.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Recognize and bargain with the Union for its employees in the following appropriate unit, as required by the above-described contract:

All employees employed by the employer-members of Inland Air Conditioning and Refrigeration Con-

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[24]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

tractors Association Inc., in the manufacture, fabrication, assembling, handling, erection, installation, dismantling, conditioning, adjustment, alteration, repairing, servicings and maintenance of all types of material and equipment used in the heating, cooling and air conditioning industry, kitchen equipment and cafeteria equipment industry, metal building industry, and all other sheet metal divisions, including all detailing used for shop fabricating, field erection, and air balancing.

(b) Forthwith sign the collective-bargaining agreement entered into by Inland Air Conditioning and Refrigeration Contractors Association Inc. and the Union in August 1976, effective by its terms from August 1, 1976 through July 31, 1978.

(c) Make whole all its employees in the appropriate unit defined above, for any loss of wages and benefits they incurred because of Respondent's failure and refusal to abide by the terms and conditions of the above-described contract in the manner set forth herein in the section entitled, Remedy.

(d) Comply with the terms and conditions of the above-described agreement both retroactively and for the balance of its term, including making to the appropriate sources the health and welfare and pension fund payments provided for therein, with interest thereon as provided in the Remedy section here.

(e) Preserve and, upon request, make available to the Board or its agents for examination and copying all payroll and other records necessary to analyze and compute the amounts of backpay due under the terms of this Order.

(f) Post at its facilities in Pomona, California, copies of the attached notice marked "Appendix."[25] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated: July 29, 1977.

/s/ Earldean V.S. Robbins
Earldean V.S. Robbins
Administrative Law Judge

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[25]In the event the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Supreme Court, U.S.
FILED
MAR 11 1980
MICHAEL RODAK, JR., CLERK

No. 79-1094

In the Supreme Court of the United States

OCTOBER TERM, 1979

AUTHORIZED AIR CONDITIONING, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 606 F.2d 899. The decision and order of the Board (Pet. App. 18-39) are reported at 236 N.L.R.B. No. 24.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 1979. The petition for a writ of

certiorari was filed on January 14, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly concluded that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing to execute and abide by a collective bargaining agreement negotiated by the multi-employer bargaining association of which it was a member and the union representing a majority of petitioner's employees at the time petitioner entered the multi-employer bargaining unit.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set out in the petition (Pet. 2-4).

STATEMENT

1. Petitioner is a heating, cooling and air conditioning contractor in the building and construction industry, and operates primarily in the Southern California area (Pet. App. 20, 22). In July of 1974, Paul Osborne, petitioner's president and general manager, contacted Paul Healy, the business manager of Local 509, Sheet Metal Workers' International Association ("Local 509"), and indicated that petitioner was interested in employing Local 509 members (Pet. App. 22). On September 9, 1974, Osborne signed, on petitioner's behalf, a collective

bargaining agreement consisting of two documents: a Standard Form of Union Agreement negotiated by the Sheet Metal Workers' International Association (the "International Union") and the Sheet Metal and Air Conditioning Contractors National Association ("SMACCNA"), and an Addendum to the Standard Form negotiated by Local 509 and the Inland Air Conditioning and Refrigeration Contractors' Association (the "Contractors' Association"). Both documents were to remain in effect until July 31, 1976 (*ibid.*).

Osborne also signed a Notice of New Shop Contract listing five persons as employees of petitioner as of September 9, 1974 (Pet. App. 23). At that time, none of petitioner's employees were members of Local 509 or had otherwise authorized Local 509 to represent them in collective bargaining (Pet. App. 22).[1] Article V, Section 1 of the Standard Form contained a "union security" provision binding the employer to require membership in the union within eight days of an employee's first day of work as a condition of continued employment (Pet. App. 22-23). Upon signing the Standard Form and the Notice of New Shop Contract, Osborne was told by Healy that petitioner's employees would have 30 days to sign applications for membership in Local 509 (Pet. App. 23). On October 9, 1974, four of the five

[1] Section 8(f) of the National Labor Relations Act, 29 U.S.C. 158(f), permits employers engaged primarily in the building and construction industry to enter into collective bargaining agreements with unions that have not yet established majority status.

employees listed on the Notice of New Shop Contract signed Local 509 membership applications. The fifth employee was an apprentice (*ibid.*).

On September 29, 1975, petitioner submitted applications for membership in the Contractors' Association and its parent organization, SMACCNA (Pet. App. 23). The one-page Contractors' Association application expressly provides, *inter alia*, that the applicant agrees to be bound by the Association's by-laws and to become a party to and be bound by existing labor agreements between the Association and Local 509, designates the Association as the applicant's collective bargaining representative, and authorizes the Association to execute labor agreements binding upon its members in accordance with the Association's by-laws (Pet. App. 23-24, 31). By letter dated December 18, 1975, petitioner was notified that it had been accepted into the membership of the Association and SMACCNA. The letter stated that the by-laws of both organizations were enclosed (Pet. App. 24).

On February 26, 1976, Local 509 gave the Contractors' Association timely notice of its intent to reopen their agreement. Negotiations commenced on May 20, 1976 (Pet. App. 6-7, 25). In June of 1976, the Association provided Local 509 with a list of its members, on which petitioner's name appeared (*ibid.*). On August 9, 1976, having failed to reach an agreement on wages, the Association and Local 509 referred the issue to the National Joint Adjustment Board, as provided in their 1973-1976 contract (Pet. App. 7, 27). On August 11, the Adjustment Board issued a unanimous decision setting forth the wage increase to be included in the new contract and providing that the contract would be effective August 1, 1976, through July 31, 1978 (Pet. App. 28). A few days later, the Association and Local 509 signed a new collective bargaining agreement, and Local 509 began to contact individual members of the Association in order to secure their signatures on the contract (*ibid.*).

In a letter dated July 14, 1976, petitioner notified the Contractors' Association of its intention to withdraw from membership effective June 1, 1976 (Pet. App. 25). The Association's board of directors took no action with respect to the letter because it was untimely under the Association's by-laws (Pet. App. 26).[2]

In late August 1976, Local 509's business manager contacted Osborne and asked him to sign on petitioner's behalf the new agreement between the Contractors' Association and Local 509 (Pet. App. 28). Osborne refused, and stated that petitioner had resigned from the Association (*ibid.*). About a week later, after learning that petitioner's letter of withdrawal from the Association was untimely, Local 509's business manager again requested Osborne to sign the agreement (*ibid.*). Osborne stated that his

[2] The Association's by-laws provide that a member may not withdraw within four months prior to or after the termination date of any collective bargaining agreement to which the Association is a party and which covers the member's employees. The by-laws also provide that a member's resignation will become effective only upon acceptance by the Association's board of directors (Pet. App. 26-27).

position had not changed and that he would not sign the agreement, explaining that "the wages are too high" in the new contract (Pet. App. 28-29). Thereafter, petitioner failed to make any of the required payments to its employees' health and pension funds as provided for in the new agreement (Pet. App. 29).

2. Local 509 then filed unfair labor practices charges. Petitioner defended by arguing, *inter alia*, that it was not obliged to bargain with the union since the Union did not represent a majority of petitioner's employees at the time the pre-hire agreement was entered into, at the time petitioner joined the Contractors' Association, or at the time petitioner refused to sign the 1976-1978 bargaining agreement negotiated by the Association. An administrative law judge rejected this contention stating (Pet. App. 32-33) (citations and footnote omitted):

> It is true that the Union represented none of Respondent's employees on September 9, 1974, when Respondent signed a collective-bargaining agreement with the Union. However, such a contract in the building and construction industry is valid under Section 8(f) of the Act. Although it is well established that a contract entered into pursuant to Section 8(f) does not of itself raise a presumption of majority status * * *, once a majority is in fact achieved, the normal presumption of majority that flows from a collective-bargaining agreement applies thereto. * * *. The record establishes that in November 1974 a majority of the employees employed by Respondent were members of the Union. Thereafter, a presumption of majority flowed from the union contract which has not been rebutted. * * *.
>
> This contract was still in force at the time Respondent joined the Association. Since the Union was then the majority representative of Respondent's employees, Respondent was free to merge them into a multi-employer unit.

The Board adopted the administrative law judge's rulings, findings and conclusions, and ordered petitioner to sign, implement, and give retroactive effect to the 1976-1978 contract, and to recognize and bargain with Local 509 as the representative of its employees (Pet. App. 18-19, 37-39). The court of appeals upheld the Board's decision and enforced its order (Pet. App. 1-17).

ARGUMENT

Petitioner does not challenge the settled proposition that the existence of a valid collective bargaining agreement creates a presumption of majority status on the part of the bargaining representative. *Hexton Furniture Co.*, 111 N.L.R.B. 342 (1955). Rather, relying on *NLRB* v. *Iron Workers, Local 103*, 434 U.S. 335 (1978), petitioner contends that such a presumption is not created where, as here, a Section 8(f) pre-hire agreement is involved. There is no merit to this claim.

In *Iron Workers*, the Court held that Section 8(b)(7)(C) of the National Labor Relations Act, 29 U.S.C. 158(b)(7)(C), was violated by union picketing to enforce a Section 8(f) agreement against an

employer utilizing non-union labor, where the agreement did not contain a union security clause and the union had never represented a majority of the employees. Because the union admittedly lacked majority status, "the collective-bargaining relationship and the union's entitlement to act as the exclusive bargaining agent had never matured." 434 U.S. at 346. The Court recognized, however, that where a union "successfully seeks majority support" after entering into a pre-hire agreement, "the pre-hire agreement attains the status of a collective-bargaining agreement executed by the employer with a union representing a majority of the employees in the unit." *Id.* at 349-350. The Court also noted, with apparent approval, the Board's view that "[o]ne-time majority status, coupled with a union security clause that has been enforced, gives rise to a rebuttable presumption of continued majority status * * *."[3] *Id.* at 351 n.12.

Here the Section 8(f) contract between petitioner and Local 509 contained a union security clause which was enforced, at least initially, and Local 509—unlike the union involved in *Iron Workers*—clearly achieved majority status among petitioner's employees in October 1974, well prior to petitioner's acceptance into the Contractors' Association, when four of petitioner's five employees became members. Once Local 509 became the majority representative of petitioner's

[3] Petitioner errs in asserting (Pet. 12-13) that the Board has never heretofore applied a presumption of majority status in the context of a Section 8(f) agreement. See pages 9-10, *infra*.

employees, its Section 8(f) agreement with petitioner attained the status of a collective bargaining agreement between an employer and a majority representative, and afforded Local 509 a rebuttable presumption of majority status for the duration of the contract. The Board, in a finding affirmed by the court of appeals, concluded that petitioner did not rebut that presumption.[4]

The Board has reached similar results in a number of cases. In *R.J. Smith Construction Co.*, 191 N.L.R.B.

[4] Petitioner's characterization (Pet. 2, 7-9, 12, 14) of Local 509 as a "minority union" is inaccurate. Petitioner attempted to rebut the presumption of continuing majority status by relying on evidence showing that less than a majority of petitioner's employees were *members* of Local 509 in September 1975 and December 1975. However, as the court of appeals correctly held (Pet. App. 13), union membership is not synonymous with union support. The fact that less than a majority of unit employees are union members or pay union dues is not in itself sufficient to rebut the presumption of a union's majority support. *NLRB* v. *Vegas Vic, Inc.*, 546 F.2d 828, 829 (9th Cir. 1976), cert. denied, 434 U.S. 818 (1977); *NLRB* v. *Tahoe Nugget, Inc.*, 584 F.2d 293, 307 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979); *Sahara-Tahoe Corp.* v. *NLRB*, 581 F.2d 767, 772 (9th Cir. 1978), cert. denied, 442 U.S. 917 (1979); *Terrell Machine Co.* v. *NLRB*, 427 F.2d 1088, 1090 (4th Cir.), cert. denied, 398 U.S. 929 (1970); *Retired Persons Pharmacy* v. *NLRB*, 519 F.2d 486, 490 (2d Cir. 1975); *Orion Corp.* v. *NLRB*, 515 F.2d 81, 84 (7th Cir. 1975); *NLRB* v. *North American Mfg. Co.*, 563 F.2d 894, 897 n.2 (8th Cir. 1977). As was explained by the Board in *Terrell Machine Co.*, 173 N.L.R.B. 1480, 1481 (1969), enforced, 427 F.2d 1088 (4th Cir. 1970), and quoted and applied in *Orion Corp.* v. *NLRB, supra*, 515 F.2d at 84: " 'There is no necessary correlation between membership and the number of union supporters since no one could know how many employees who favor union bargaining do not become or remain members thereof (citations omitted).' "

693, 695 n.5 (1971), the Board recognized that a presumption of majority status could arise from a Section 8(f) contract containing a union security clause that was subsequently enforced. And in *Irvin-McKelvy Co.*, 194 N.L.R.B. 52 (1971), *Williams Enterprises, Inc.*, 212 N.L.R.B. 880, 885 (1974), and *Peter Kiewit Sons' Co.*, 206 N.L.R.B. 562, 569 (1973), the Board concluded that once a union signatory to a Section 8(f) contract achieves majority status, it is entitled to the same presumption of continuing majority status as flows from a collective bargaining agreement, and that the contract is enforceable against the employer.

The cases relied upon by petitioner (Pet. 10-12) are inapposite. In *Alton-Wood River Building & Construction Trades Council*, 144 N.L.R.B. 260 (1963), none of the employees became members of the union until after the employer had joined the multi-employer bargaining association; thus the union did not enjoy a presumption of majority support at the time the employer entered the multi-employer unit and its employees were never effectively merged into that unit. Similarly, in *Davenport Insulation, Inc.*, 184 N.L.R.B. 908 (1970), the Board held that no presumption of majority status resulted from a union's Section 8(f) contract where there was uncontroverted evidence that the union never represented a majority of employees in the relevant unit. Here, however, Local 509 obtained the support of a majority of petitioner's employees, and did so before petitioner joined the Contractors' Association. In

NLRB v. *AAA Electric, Inc.*, 472 F.2d 444 (6th Cir. 1973), the union's majority status was rebutted by the lawful termination of the work-force. Here, the presumption of continuing majority status stands unrebutted (Pet. App. 12-13, 32-33). Therefore, petitioner's employees were lawfully merged into the multi-employer bargaining unit when petitioner joined the Contractors' Association.

Nor is there merit to petitioner's assertion (Pet. 8-10) that *Iron Workers* requires that a union's majority status be established on a project-by-project basis before a pre-hire agreement can attain the status of a collective bargaining agreement. To support its position, petitioner relies (Pet. 8, 10, 11) on this Court's statement in *Iron Workers* that "[t]he employer's duty to bargain and honor the [Section 8(f)] contract is contingent on the union's attaining majority support at the various construction sites" (434 U.S. at 345-346, citing with approval *NLRB* v. *Irvin-McKelvy Co.*, 475 F.2d 1265 (3d Cir. 1973). However, in *Irvin-McKelvy* the pre-hire contract was applicable only on a project-by-project basis (475 F.2d at 1267, 1270), and in *Iron Workers* the union never acquired majority support at any project. Here, the pre-hire contract was not a "project only" agreement. Rather, the relevant bargaining unit was petitioner's entire employee complement, and the record amply demonstrates that the union acquired majority support in that unit.[5]

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[5] As the Board explained in *Precision Stripping, Inc.*, 245 N.L.R.B. No. 34 (Sept. 21, 1979), slip op. 3-4, where an em-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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ployer has a "permanent complement of workers, who [move] from site to site" and are covered by the agreement, the unit encompasses all of the sites at which those employees may work. There, the Board noted the distinction recognized in *Dee Cee Floor Covering, Inc.*, 232 N.L.R.B. 421 (1977), between such units and "those in which the employer hires on a project-by-project basis" (slip op. 3 n.6). Similarly, *G. M. Masonry*, 245 N.L.R.B. No. 54 (Sept. 24, 1979), on which petitioner also relies, involved project-by-project hiring.

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